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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Case No: 1:24-cv-05752 (JMF)

KISSINGER N. SIBANDA

Plaintiff,

v.

DAVID ELISON, et al

Defendants.

MOTION FEES:

PLAINTIFF'S OPPOSITION

INTRODUCTION:

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3 (“A pleading, motion or other paper **violates** Rule 11 ... where, after reasonable inquiry, a
4 competent attorney could not form a reasonable belief that the pleading is well **grounded in fact**
5 and is warranted by existing law or **good faith argument for the extension, modification or**
6 **reversal of existing law.**”) (quoting *Kropelnicki v. Siegel*, 290 F.3d 118, 131 (2d Cir. 2002)
7 (internal citations and quotations omitted)).
8

9 Emphasis added.

DEEP ISSUE:

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12 Should Rule 11 monetary determination ignore the movant’s own omissions,
13 misrepresentations, inequitable conduct towards non-movant and current posture of the on-going
14 dispute?
15

PRELIMINARY STATEMENT:

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18 As an initial matter, the sanctions here were for the second claim in the first amended
19 complaint, 18 U.S.C. 241; notwithstanding that the whole complaint **was not dismissed with**
20 **prejudice**, the sanctions were awarded generously to defendants, taking into consideration that
21 the claim and the whole lawsuit comprise one filing. Plaintiff is being punished because he is
22 seeking to **extend or modify the existing law**, his good faith reason for the criminal statute, was
23 rendered “frivolous,” by this bench. In comparison with other lawyers, who routinely over plead
24 and have their complaints dismissed without sanctions, even when they deliberately misrepresent
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- 2 -

OPPOSITION: MOTION FOR FEES

1 facts – sanctions are seldom given, only stern warnings. E.g. *Malibu Media, LLC v. Doe*, No. 18-
2 CV-10956 (JMF), 2019 WL 1454317, at *2 (S.D.N.Y. Apr. 2, 2019). A warning renders the
3 issue closed. *Id.* This is the deep issue underlying this opposition
4

5 Comparatively, this District (SDNY) has not given sanctions, in instances even when
6 complaints were dismissed with prejudice, ending the lawsuit. Sanctions for improper vehicle
7 pleading, are not only rare but seldom given, as it chills the arguments in the ongoing dispute.
8 See *Zuma Press, Inc. v. Getty Images (US), Inc.*, 2019 WL 13411214, at *1 (S.D.N.Y. Aug. 23,
9 2019) (“With respect to Defendant’s motion for attorneys’ fees, although I dismissed Plaintiffs’
10 claims, I **cannot** say that the claims and arguments advanced by Plaintiffs were objectively
11 unreasonable, frivolous, motivated by improper purposes, or otherwise appropriate for an award
12 of attorney fees.”), *aff’d*, 845 F. App’x 54 (2d Cir. 2021).
13

14 Here, this dispute is ongoing, pre-discovery, thus, the jurisprudence is similar to *Zuma*
15 *Press Inc.* Restraint as to facts is required. Statements suggesting that the bench ‘knows,’ the full
16 milieu of undiscovered facts are inappropriate and premature.; especially statements regarding
17 motive of parties involved in this litigation.
18

19 Here the underlying, and main Copyright Infringement claim, with its proper
20 jurisdictional arguments, survived dismissal with prejudice and was brought for proper purposes
21 – to address the injury, a was the case with the second claim. The second claim, criminal
22 conspiracy, was merely supplemental in nature and would not have subject matter jurisdiction in
23 this Court, if the court did not exercise its federal law jurisdiction under 28 U.S.C. § 1331. The
24 suggestion that the second claim was roped in, to tie defendant Lin to the case, is an advocacy
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position of the defendant like an *opening argument* – nothing could be further from the truth. As evidence shows, from plaintiff’s position, defendant Lin’s conduct in the first action she prosecuted justifies the civil conspiracy and abuse of process claims, as is restated in the second action, 1:24-cv-06310 (JMF). If defendant Lin had not sued plaintiff in the Central District matter, she would not be a party to the litigation because the claims deal with her conduct during the prosecution of that lawsuit. This is meritorious pleading, and not a personal vendetta against her. The same way, mis-prosecution is a valid claim against a criminal prosecutor who goes too far.

Intricately, the bench stated, and has repeated this, that the defense against the Rule 11.b motion, waiting to see what the outcome in the Central District matter would be is based on false ‘premise.’ ECF: 130. No so. The Second Circuit agrees with plaintiff, it has stated that filing a claim when one is pending in another District Court is duplicative and grounds for a quick dismissal, simple put, it is bad litigation strategy:

A motion to dismiss a complaint as duplicative invokes the Court's inherent power to control its docket. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138–39 (2d Cir.2000).

As the Second Circuit observed in *Curtis*: *2 As part of its general power to administer its docket, a district court may stay or dismiss a **suit that is duplicative of another federal court suit**. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (“As between federal district courts, ... though no precise rule has evolved, **the general principle is to avoid duplicative litigation.**”); *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir.1991); *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir.1977) (*in banc*). The

1 complex problems that can arise from multiple federal filings do not lend themselves to a rigid
2 test, but require instead that the district court consider the equities of the situation when
3 exercising its discretion. *See Colorado River*, 424 U.S. at 817; *Kerotest Mfg. Co. v. C-O-Two*
4 *Fire Equipment Co.*, 342 U.S. 180, 183–84, 72 S.Ct. 219, 96 L.Ed. 200 (1952) (affirming stays
5 of declaratory judgment action on patents' validity in Delaware while patent infringement suit in
6 Illinois proceeded); *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 80 (2d
7 Cir.1989). We review the exercise of this power for abuse of discretion. *See Adam*, 950 F.2d at
8 92. DiGennaro v. Whitehair, No. 09-CV-6551-CJS-MWP, 2010 WL 4116741, at *1–2
9 (W.D.N.Y. Oct. 19, 2010), aff'd, 467 F. App'x 42 (2d Cir. 2012).

12 The rule against duplicative litigation is distinct from but related to the doctrine of claim
13 preclusion or *res judicata*. As the Supreme Court stated over 100 years ago in *United States v.*
14 *The Haytian Republic*, 154 U.S. 118, 14 S.Ct. 992, 38 L.Ed. 930 (1894), “The true test of the
15 sufficiency of a plea of ‘other suit pending’ in another forum is the legal efficacy of the first suit,
16 when finally disposed of, as ‘the thing adjudged,’ regarding the matters at issue in the second
17 suit.” *Id.* at 124. The two doctrines serve some of the same policies.

19 The power to dismiss a duplicative lawsuit is meant to foster judicial economy and the
20 “comprehensive disposition of litigation.” *Kerotest Mfg.*, 342 U.S. at 183. The doctrine is also
21 meant to protect parties from “**the vexation of concurrent litigation over the same subject**
22 **matter.**” *Adam*, 950 F.2d at 93. DiGennaro v. Whitehair¹, No. 09-CV-6551-CJS-MWP, 2010
23 WL 4116741, at *2 (W.D.N.Y. Oct. 19, 2010), aff'd, 467 F. App'x 42 (2d Cir. 2012)

After reviewing the complaint filed in this case and comparing it to the complaint filed in the 2007 case, the Court determines that claim preclusion would apply, and that the second lawsuit is, indeed, duplicative of the first. Plaintiff concedes that the first and second actions arise from the same fact pattern: DiGennaro v. Whitehair, No. 09-CV-6551-CJS-MWP, 2010 WL 4116741, at *3 (W.D.N.Y. Oct. 19, 2010), aff'd, 467 F. App'x 42 (2d Cir. 2012).

The core issue in the Central District would have been similar to any federal lawsuit filed by plaintiff in another District, that is – *whether or not “Gemini Man” infringes “The Return to Gibraltar’s copyright?”* Accordingly, a second lawsuit would have been duplicative. *Id.* It is duplicative. Any statement to contrary to this [duplicative point] is frivolous for the cases cited above.

Plaintiff has painstakingly stated that the reason for the criminal statute vehicle claim was not improper but motivated by novel pleading: **to bring defendants level of culpability, omissions and misdeed to the court’s attention and secondly, in an open court – allowing defendants to defend themselves**². Several federal criminal statutes have civil remedies, including sex trafficking under 18 U.S.C. § 1591, et seq. – the fact that in this instance, the federal law had no civil remedy does not mean plaintiff was entirely off and his good faith

² Plaintiff does not believe in *ex parte* communication with the bench.

1 motive³ has no basis in the current legal system⁴. An error, which will be asserted to the second
 2 circuit, because all controversies of credibility are resolved in the favor of the signor.

3 A court must review the facts “objectively,” see *Storey v. Cello Holdings, L.L.C.*, 347
 4 F.3d 370, 387 (2d Cir. 2003), and, “[w]hen divining the point at which an argument turns from
 5 merely losing to losing and sanctionable, ... **resolve all doubts in favor of the signer” of the**
 6 **pleading.** *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993) (internal quotation
 7 marks omitted) (emphasis in the original).

8
 9 The day when litigants can seek civil enforcement of criminal statutes is the direction of
 10 civil pleading, it is not a frivolous idea with no comparative basis for its novelty. In South Africa
 11 for example civil prosecution of a crime is possible.
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16 ³ Plaintiff asserts that the resolution of whether it was good faith or bad faith to bring the criminal statute, to the
 17 attention of the court, in the manner it was done – was resolved against plaintiff, and not pursuant to Rule 11.b, is
 18 symptomatic of the kind of bias the bench has against plaintiff. It has very low regard for plaintiff. The bench has
 19 never even held one single telephone conference, or an oral hearing on any motion on this docket, let alone the
 20 sanctions motion – but was comfortable sanctioning plaintiff? Even on the issue of whether defendant Lin, has
 authority to represent her co-defendants, clearly violating Ca. Bar Rule 1.7, the bench remains lukewarm on the
 issue, trusting defendant Lin’s “word,” without seeing any affidavits. While the word of defendants, even when they
 make mistakes, is golden – while the plaintiff’s word is cement.

21 This is not adjudication but favoritism. Other judges would have long held a conference to address this
 22 issue [standing to represent co-defendants] and take evidence from both sides because it affects whether its own
 decisions can be overturned “due to fraud,” in the future. But because this issue is in plaintiff’s favor – the court
 deems it frivolous.

23 It is an issue, so far as a litigant in this matter is concerned, and will remain so, until Ca. Bar Rule 1.7, is
 24 satisfied or the Second Circuit affirms the District court’s decision. Courts exist for public hearings and testing the
 facts, they do not exist for the purpose of Judges and their chambers to write orders against one litigant. Not a single
 telephone conference on a matter, is a highly irregular statistic.

25 ⁴ Plaintiff concedes that if criminal statutes could never present a civil remedy, plaintiff’s second claim would have
 26 been frivolous. Period. But in the context of the civil remedies available for some federal criminal statutes, the novel
 pleading was within an “objective reasonable,” circle. The difference between frivolous and good faith is the
 27 difference between the following predictions: if you jump up while standing on earth you will land on the moon
 (frivolous). And plaintiff’s analogous argument ‘if you jump you could hurt yourself.’ ‘

1 The bench should reflect on this before making a final appealable sanctions decision.
2 Parties, have a second action pending, in which facts and advocacy, will be tested for a second
3 time; accordingly, sanctions were premature against plaintiff and restrained against defendants –
4 two separate adjudicative standards. The court has inherent power to reissue a new Order,
5 revising its sanctions decision.
6

7 However, Plaintiff concedes that the sanctions motion award, to a certain degree is not
8 entirely based on the bench’s misreading of the caselaw and facts of the matter. The way
9 defendants write about plaintiff inn general, paints a very negative picture of plaintiff and his
10 underlying claims– plaintiff has suggested that this is informed by racism not the actual merits of
11 this matter. This is defendants’ intended litigation strategy: attack the litigant while ignoring the
12 copyright infringement.
13

14 ARGUMENT

15 Defendants’ argument for what is reasonable was incorrectly stated:

16 *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), cited by movant, Def. Motion at 2,
17 is irrelevant here, because it deals with *reasonableness* for Section 1988 attorney fees in a civil
18 rights matter. This was defendants’ only cited case for their “reasonableness,” argument.
19

20 Defendants did not state the standard or applicable law for *reasonableness* for sanctions
21 awards in this circumstance: Rule 11. Thus, while defendants are correct that the lodestar
22

1 applies, they are mistaken for how it applies to sanctions to adjudicate reasonableness, *Perdue* is
 2 not the case⁵.

3 In fact, *Perdue* warns:

4 [t]hat [sanctions] does not provide “a form of economic relief to improve the financial lot of
 5 attorneys[]

6 Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 542, 130 S. Ct. 1662, 1667, 176 L. Ed.
 7 2d 494 (2010).

8 *

9 Addressing whether the amount requested by defendants in their motion for fees is
 10 *reasonable* or not, the main issue, Plaintiff will take a two-tier approach, (a) whether defendants’
 11 attorneys have shown evidence of their right to represent the defendants on whose standing they
 12 seek fees (b) and, the *reasonable* nature of fees sought.

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 18 ⁵ “ This Court has established six important rules that lead to today’s decision. First, a “reasonable” fee is one that is
 19 sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case,
 20 see *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d
 21 439, but that does not provide “a form of economic relief to improve the financial lot of
 22 attorneys,” *ibid.**543 Second, there is a “strong” presumption that the lodestar method yields a sufficient fee.
 23 See, *e.g.*, *id.*, at 564, 106 S.Ct. 3088. Third, the Court has never sustained an enhancement of a lodestar amount for
 24 performance, but has repeatedly said that an enhancement may be awarded in “rare” and “exceptional”
 25 circumstances. *E.g.*, *id.*, at 565, 106 S.Ct. 3088. Fourth, “the lodestar includes most, if not all, of the relevant factors
 26 constituting a ‘reasonable’ attorney’s fee.” *Id.*, at 566, 106 S.Ct. 3088. An enhancement may not be based on a factor
 27 that is subsumed in the lodestar calculation, such as the case’s novelty and complexity, see, *e.g.*, *Blum v.*
 28 *Stenson*, 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891, or the quality of an attorney’s performance, *Delaware*
Valley, supra, at 566, 106 S.Ct. 3088. Fifth, the burden of proving that an enhancement is necessary must be borne
 by the fee applicant. *E.g.*, *Blum*, 465 U.S., at 901, 104 S.Ct. 1541. Sixth, an applicant seeking an enhancement must
 produce “specific evidence” supporting the award, *id.*, at 899, 901, 104 S.Ct. 1541, to assure that the calculation is
 objective and capable of being reviewed on appeal. Pp. 1672 – 1674.
Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 542–43, 130 S. Ct. 1662, 1667, 176 L. Ed. 2d 494 (2010)

1 It is plaintiff's right to frame the argument in the most effective manner under the First
2 Amendment for this opposition. The standing of a lawyer, pre-dates any argument a lawyer can
3 make on behalf of their "client." A notice of appearance is an elementary filing in any
4 adversarial proceeding. Defendant Lin never filed a notice of appearance in 1:23-cv-05752
5 (JMF), that plaintiff is aware of.

7 **(A) DEFENDANTS' ATTORNEY LIN DOES NOT HAVE A RIGHT TO COLLECT**
8 **FEES ON BEHALF OF HER PURPORTED CLIENTS:**

9 To the degree that the bench disagrees with plaintiff – this is the basis of the appeal with
10 the Second Circuit pending (proof of standing). Plaintiff restates the argument that Ca. Bar. Rule
11 1.7, stating that a lawyer must have written affidavits to support representation in which
12 defendants have a conflict of interest was not addressed by this court in any evidential hearing,
13 telephone conference or through in person testimony.

14 Even though defendants' attorneys Lin and Labate are aware of the issue regarding
15 whether or not they have standing, they have merely stood by the side and let the issue be
16 litigated between plaintiff and the bench, as passive observers divorced from any interest in the
17 outcome. They (defendants) through their attorneys, could have voluntarily submitted the
18 evidence in camera or privately to plaintiff but their comfort level of having Judge Furman argue
19 on their behalf is remarkable, if not suspicious.

20 Plaintiff repeats, what he has stated before, the inquiry into the evidence is being
21 requested by plaintiff, to justify the underlying claim of fees against him. Their right to collect
22 the money.

(B) THE FEES REQUESTED BY DEFENDANT ATORNEYS ARE UREASONABLE

The next inquiry is whether the fees requested by defendants are reasonable? The answer is No.

Under the lodestar approach, hours multiplied by amount gives the correct amount; here, both the hours, time spent (over 60 hours), and the hourly rates are unreasonable. The amount of over \$25,000 is unreasonable, not only for work required to produce the legal pleadings in comparative practice, but the lack of complexity of the issue: a criminal claim misplead.

i. Time:

Accordingly, what defendants have submitted to support over 60 hours of legal work, by a team of four – working on simple legal argument in a Rule 11 motion is *unreasonable*. It is intended to punish plaintiff for bringing a lawsuit against them and is not justified by the quality or complexity of the legal work.

Insert – Def. Declaration, from Exhibit: A.

For def. Lin:

Skydance Defendants' Rule 11 Motion:

Timekeeper	Rate	Hours	Dollars
Ashlee Lin	\$500	19	9500
Elaine Li	\$350	9.3	3255

Angelo Labate	\$350	3.2	1120
Veronica Velasco	\$0	8.5	0

Ashlee Lin's Rule 11 Motion:

Timekeeper	Rate	Hours	Dollars
Ashlee Lin	\$895	1.25	993.75
Angelo Labate	\$575	14.35	8251.25

Total Fees for Rule 11 Motions:

Hours	Dollars
55.6	23,120

From Exhibit: B.

Fee Application:

Timekeeper	Rate	Hours	Dollars
Ashlee Lin	\$500	2.3	\$1,150
Angelo Labate	\$350	3.8	\$1,330

Madeleine Smith	\$150	2.5	\$375
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Total Fees for Fee Application:

Hours	Dollars
8.6	\$2,855

Defendants are seeking \$25,975 from plaintiff. This request must be denied and seen for what it is, abuse of Rule 11 sanctions to punish plaintiff for bringing a copyright Lawsuit against them, over 60 hours for a pleading largely like their motion to dismiss is not an honest accounting of amount of work required for the specific Rule 11 work.

Defendants have not shown other instances in which pleadings of this nature resulted in such high sanctions when the suit remains on the docket and survived dismissal with prejudice in its entirety. Defendants were not prevailing parties entitled to fees under Copyright Law. Indeed, defendants offer no case comparators, only their “word,” asking for the \$25,000. This is in a case where defendants have offered plaintiff only a zero-dollar-walk away so far, the irony is noticeable: they [defendants] are worthy for compensation for their legal work but plaintiff despite the Copyright Infringement, should never be the recipient of a fair settlement.

1 Defendants Rule 11 motions overstate their time. Their legal arguments do not require 19
2 hours for Lin and 14 hours for Labate to write, despite what their argument is for such a time
3 allotment. This is based on the complexity of the legal argument, the cases they cited and general
4 knowledge of how legal practice works. ECF: 73, and ECF: 80, and their replies do not show that
5 they are the product of over 60 hours; such time is normally reserved for appellate briefs over 55
6 pages long, that cite to a case record, compare District cases and make an argument for an
7 appeal. Not trial motions.
8

9 Moreso, when adjusted for their duplicity, the Rule 11 motions, – defendants filed two
10 somewhat identical sanctions motions instead of an omnibus for their sanctions; this was their
11 lack of efficiency which they cannot transfer to plaintiff. The purpose of the two sanctions
12 motions (Labate and Lin), was to by-pass page limits while also hammering their advocacy
13 position through repetitive advocacy – plaintiff is not responsible for this wasteful approach,
14 when ECF: 73 and 80, are substantively similar or could have been better integrated as one solid
15 omnibus document. The two pleadings are essentially identical, ECF: 73, was written by
16 defendant Lin, while ECF: 80 was written by Labate. There are identical with slight variations.
17

18 As a comparator, plaintiff takes on such motions, with an hour research and an hour of
19 editing, taking into consideration that the motion for sanctions had underlying common research
20 with defendants’ motion to dismiss.
21

22 *Secondly*, the two motions and their replies were duplicative when compared to the
23 defendants motion to dismiss the second claim – namely, that 18 U.S.C 241, gives no civil
24 remedy. Even if a Rule 11 motion had not been filed, defendants were contracted by their clients
25
26

1 to submit a motion to dismiss. The fees of which they have no right to collect from plaintiff
2 under the American Rule unless they were a prevailing party. Defendants were not a prevailing
3 party.

4
5 **ii. DEFENDANTS REQUESTED AMOUNT IS UNREASONABLE**

6 Defendants did not show any comparator or verifiable proof that the two pleadings, ECF: 73
7 and ECF: 80, and their replies, cost over \$25,000, with the contemporaneous pleading included,
8 but provided dubious “receipts,” and “pre-bills.”

9 The sanctions motion did not require any knowledge of any copyright law and expertise in
10 copyright law is a red herring. Exhibit: C. A lawyers’ knowledge of Rule 11 predates⁶ the
11 pleading and would not be researched, only the case law, thus the suggestion that defendants’
12 attorneys spent over 60 hours on their sanctions motion, for one claim, for a matter they
13 previously prosecuted and are familiar with the underlying facts, is unbelievable. Moreso, given
14 that they were working on a motion to dismiss. At most, defendants’ firm spent four hours; billed
15 at \$250 and with an office expense of \$250, thus, \$1250. And then exaggerated the time spent on
16 the Rule 11 motion due to their clients’ deep pockets.

17 Overbilling the client, is not plaintiff’s fault; the reasonable Rule 11 billing for the incidental
18 issue (criminal claim misplead), incidental to their motion to dismiss is not \$25,000, and no
19 comparative case supports defendants high billing total of over \$25,000 for a Rule 11 motion
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25 ⁶ Both Labate and Lin have law degrees in which Rule 11 was covered in their Civil Procedure class. Accordingly,
26 motion practice would limit their inquiry to facts justifying Rule 11 and case law. Here, defendant Lin was aware of
27 the facts, as she prosecuted the first dispute between parties. The only issue was bad faith, which was a legal
28 advocacy position using her version of the facts.

1 practice submitted the same time with their motion to dismiss. Defendants deliberately
2 duplicated their Rule 11 work, as opposed to submitting an omnibus, even though they are
3 clearly one firm, Eisner LLP, – this mistake cannot be transferred to plaintiff because Rule 11
4 sanctions are for deterrence not punishment or bonuses.

5
6 Since Lin and Labate are not Rule 11 experts, they cannot bill at their nominal Copyright
7 Law rate in which they have experience and expert status, this is an ethical precept for legal
8 billing. In addition, both attorneys (Lin and Labate) did not seek to have their legal history form
9 part of their expert knowledge and hence justification for the high hourly amounts: Lin - \$500,
10 and Labate - \$350, as litigation experts is equally precarious. They cite no post JD experience in
11 litigation justifying such a rate. The fact that one is a partner in a law firm, with only a JD and
12 ten years legal experience, does not justify a \$500/hour rate just because they made partner
13 status, on a simple, run of the mill Rule 11 motion – duplicative for that matter.

14
15 The suggestion that defendants spent \$2,850, for their instant motion for papers is equally
16 questionable. Even though Lin and Labate tout themselves as copyright attorney, their four-page
17 instant application, has only two cases cited and falls far short of what the court expected from
18 them: to state the law, reasonable standard and provide authentic receipts.

19
20 The cases cited by defendants in their motion for fees have but a conclusory insertion into
21 defendants' motions and arguments. Lacking any serious discussion of the holdings. For
22 example, the *Perdue* case, previously discussed *supra*, deals with Section 1933, attorney fees.
23 Interesting enough, this District has held that failure to cite controlling law in a motion could
24 subject a lawyer to Rule 11 sanctions, *sua sponte*.

iii. DEFENDANTS' FEE EXHIBITS (A-B) LACK AUTHENTICITY

The evidence adduced by defendants in aid of their fees falls far short of being credible, as already stated. For one it is heavily redacted. To the extent that it was defendants' responsibility to either give plaintiff an un-redacted copy privately, that inadequacy cannot be shifted to plaintiff to fill the gaps or the bench to save them. Stated differently, if defendants wish to collect the amount requested in their motion papers, then un-redacted information was necessary because it became an issue they were aware of in the pleadings leading up to their request. Not once during the request by plaintiff for limited discovery did defendants speak for themselves on the issue.

However, if the court is inclined to view the redacted records as fine, plaintiff asserts that those same exhibits lack authenticity for their intended purposes under Federal Rule of Evidence Rule 803 (6) E, as follows:

✻

Exhibit: \underline{B} , on the top right corner states that:

Eisner LLP
Draft Work-In-Progress
Through 09/12/24
Matter ID 2915-03001

Pre Bill # 66284

Def. Motion for fees: Exhibit: B

Accordingly, it is not even a bill to be reimbursed for services and has not been paid by defendants, it is a pre-bill. Defendants are essentially seeking to double dip as the bill is a draft not a final bill served on clients.

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OPPOSITION: MOTION FOR FEES

bag of apples, even when directed to the same person, a Mr. John, is not the correct evidence to show that Mr. John paid for his bag of apples⁷. The argument that Mr. John is the same individual or client, does not authenticate the purchase for the apples. This authentication concern regarding Exhibits: A and B, suggest the invoices were manufactured after the fact or recycled from previous Eisner LLP files.

See insert:

Sibanda, Kissinger v. Gemini Pictures,
LLC dba Gemini Pictures Georgia. LLC -

See also, top left, Exhibit: A and B

The receipts neither cite to the same docket number, party names or court matter. These discrepancies, suggest the receipt is inauthentic or manufactured for these fee application proceedings: the party names are different from the dockets name, only stating *Sibanda, Kissinger v. Gemini Pictures LLC*.

Defendants could have listed the billing entry as “et al”, but they never did that, only listing one party, in these proceedings; accordingly, the case on the receipt is - *Sibanda Kissinger v. Gemini Pictures, LLC*, and is not the same as *Kissinger Sibanda v. David Elison, et al.* 1:23-05752 (JMF), the case at bar.

Thirdly, defendant Lin did not submit an invoice for the services Labate rendered to her. Accordingly, to Exhibit: A and B, show Gemini Pictures LLC was billed for the work done on

⁷ Plaintiff references this as the ‘Dear John Predicament’ the receipt shows that John paid, but not for the apples. Exhibit A and B, shows Eisner LLP were paid, but for what matter, certainly not this one, and from which client?

defendant Lin’s motion for sanctions. There is no invoice billing “Ashlee Lin.” The primary beneficiary of dismissal of the second claim; unless defendant Lin is suggesting Eisner LLP paid for her defense?

Essentially, what the defendants are asking the bench to do, is take the sanctions award and punish plaintiff financially, regardless of the veracity of their receipts, times and rates. Not to look closely at the receipts submitted, but to “take their word.” This is unacceptable in a court of law – both sides approach the bench with evidence, when seeking exceptions to the normal rules, here the American Rule, stating that no opposition pays for another’s litigation costs. When sanctions are given then the bench, treats the request for fees, also under Rule 11 guidelines, the motion papers for fees must be honest and adduce honest receipts – not doctored receipts from other matters or with other clients.

Exhibits: A and B do not pass muster under Federal Rule of Evidence 803 (6) (E), because: the opponent [plaintiff] has shown that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness⁸. *Id.* This is black letter law, the lack of evidential trustworthiness of the receipts cannot be used for its intended purpose – to collect sanctions money from plaintiff⁹. The issue of how and when defendants were billed was squarely the burden of defendants and their attorneys.

⁸ Once the movant’s evidence is excluded, the movant can no longer use that evidence in their argument. Irrelevant evidence, that is not trustworthy is not admissible under Federal Rule of Evidence rule 402. Defendants Exhibits: A-C, are classic examples of evidence that is not trustworthy.

⁹ Or in the words of Judge Furman, “what plaintiff owes defendants?”

If the sanctions judgment amount were to be finalized, then it should be based on honest evidence by defendants. This was defendants' burden of proof, not plaintiff's burden. Equally concerning, it was defendants' burden to brief the case law for the bench regarding *reasonableness for sanctions*. This lack of briefing on controlling law, has been held to be sanctionable in of itself.

(C) PLAINTIFF'S REQUEST FOR \$0 AWARD AS SANCTIONS AMOUNT

Having stated the lack of standing and the unreasonable time amount - unsupported by the evidence of hours spent; and contemporaneous billing to defendants, or comparator cases, plaintiff requests the court to award the \$0 amount. The reasons for such an award are as follows, noting the mitigating factors that argue against defendants benefitting in a pending matter before the courts:

1. Defendants have engaged in fact misrepresentations before this court which was sanctionable. ECF: 143. Leniency shown towards defendants was to the prejudice of plaintiff and his case. If there is general leniency given, it should apply to both parties.
2. Rule 11 sanctions are primarily intended to *deter future action* – plaintiff does not need to be punished financially to be deterred, briefing of this sanction liability shows that plaintiff takes seriously the issue and is deterred regarding seeking to assert criminal claims in civil cases. The moment is teachable.
3. The matter is still ongoing, to the extent that the new action might reverse the bench's initial views on plaintiff's intent after looking at the facts adduced in the new action, 1:24-cv06310 (JMF). The bench should take a cautionary approach regarding sanction

amounts, which might latter be negated by discovery of what defendants have done, as alleged in the new action.

4. Rule 11 sanctions are seldom given *for ongoing disputes*, still pending before this court.

Plaintiff could not find one case of a Rule 11 sanction, in which the matter was either refiled with essentially the same facts needing further adjudication by the bench. Rule 11 sanctions are normally placed on a finalized case. Rule 11 has very strict guidelines:

“The standard for imposing Rule 11 sanctions, however, **is purposefully high, so as not to stifle legal creativity and zealous advocacy.**” *City of Perry, Iowa v. Procter & Gamble Co.*, No. 15 Civ. 8051 (JMF), 2017 WL 2656250, at *2 (S.D.N.Y. June 20, 2017). Rule 11 sanctions should be granted with caution, applied only when “a particular allegation is utterly lacking in support.” *In re Highgate Equities, Ltd.*, 279 F.3d 148, 154 (2d Cir. 2002) (quoting *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (S.D.N.Y. 1996)); *Kiobel v. Milson*, 592 F.3d 78, 81 (2d Cir. 2010); (*see also Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 387 (2d Cir. 2003) (“When reviewing Rule 11 sanctions ... we ... need to ensure that any [sanctions] decision **is made with restraint.**”) (internal quotation marks omitted)).

Emphasis added.

5. The sanctions were awarded without a hearing: however, **it was proper for court to conduct Rule 11 hearing to determine** whether to impose sanctions after court found that there was no legal basis for the complaint, notwithstanding claim that sanctions were mandatory under the version of Rule 11 in effect at the time, as grant of summary judgment did not mandate imposition of sanctions and hearing was necessary to

determine whether there was a violation of Rule 11, and, if so, to determine an appropriate sanction. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.(1988 Ed.). *Silva v. Witschen*, 19 F.3d 725 (1st Cir. 1994). (Emphasis added).

6. In determining to impose Rule 11 sanctions, it was proper for court to address the issue of **whether the suit was brought for improper purpose** even though it had already determined that attorney had failed to make a reasonable inquiry. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.(1988 Ed.). *Silva v. Witschen*, 19 F.3d 725 (1st Cir. 1994). (Emphasis added).

Conclusion

Plaintiff requests the court to deny the fees because the amount (hourly rate) and hours are *unreasonable*; made more unreasonable by the lack of authenticity of the “bills” submitted in their support.

Furthermore, sanctions award would chill¹⁰ the ongoing adversarial nature of this dispute because facts have not been fully discovered, essentially – it is premature to make fact-based conclusions from the bench regarding motives and counter-motives for either party because

¹⁰ It also sends the wrong message to defendants regarding their own Rule 11 legal obligations. More supportive of this theory, is that defendants made misrepresentations to the bench after they had won their sanctions motion. *See* defendants motion to compel, response and Order, ECF: 134-136. To suggest that awarding over \$25,000 to defendants will not embolden their disrespectful conduct towards plaintiff (in settlement negotiations for example), misrepresentations to the court and half-truths regarding the underlying Copyright Infringement, would be to miss the writing on the wall and to ignore the history of this case. The Bench should also take into consideration that in the Central District matter, plaintiff spent a considerable amount of time to force defendants to voluntarily dismiss their case against him. He received not a cent for his legal work, the Ninth Circuit deemed him not to be the prevailing party.

1 testimony and evidence has not been adduced (discovery has not been conducted) in this matter,
2 the claims are not *res judicata*. See, generally (Wigmore on Evidence¹¹).

3 Dated: 09/23/2024

Washington, DC

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Signature

DR. KISSINGER N. SIBANDA ESQ

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11 Stating that cross-examination is how you arrive at truth.

CERTIFICATE OF SERVICE

Plaintiff, Dr. Kissinger N. Sibanda SERVED all parties, through their representatives via ecf.

Date: September 23, 2024


Signature

DR. KISSINGER N. SIBANDA
Pro Se Plaintiff